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No. 87-1344

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In the Supreme Court of the United States

OCTOBER TERM, 1988

**EDWIN MEESE III, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., PETITIONERS**

v.

JACK ABBOTT, ET AL.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the constitutionality of prison regulations and policies governing the receipt of publications by federal prisoners should be evaluated under the strict scrutiny standard enunciated in *Procunier v. Martinez*, 416 U.S. 396 (1974).

PARTIES TO THE PROCEEDINGS

In addition to the petitioner named in the caption, the following were defendants in the district court and are petitioners in this Court: Elliott L. Richardson, Norman A. Carlson, Ralph A. Aaron, Noah Allredge, Marvin R. Hogan, George W. Pickett, Elwood O. Toft, Charles Campbell, P.J. Ciccone, Loren E. Daggett, James Henderson, Mason Holley, John J. Norton, Paul Walker, and Samuel J. Britton. Additional petitioners, who are defendants pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, are the current director of the Bureau of Prisons and the current wardens at various federal prisons: J. Michael Quinlan, John Sullivan, Calvin Edwards, Patrick W. Keohane, Gary Henman, Tom C. Martin, Dave Kastner, Al Turner, Joseph Petrovsky, Robert Honstead, Dennis Luther, Roderick D. Brewer, and Robert Matthews.

In addition to the respondent named in the caption, the following were plaintiffs in the district court and are respondents in this Court: the Prisoners' Union, Weekly Guardian Associates, and the Revolutionary Socialist League.

In addition to the various claims for equitable relief, respondents' lawsuit also involves individual damage actions by 82 named plaintiffs. Those claims were severed by the district court in 1979; they have not yet been adjudicated and are not part of the present proceeding.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 824 F.2d 1166. The opinion of the district court (Pet. App. 26a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1987 (Pet. App. 50a-51a). A petition for rehearing was denied on October 13, 1987 (Pet. App. 52a). On December 24, 1987, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 10, 1988. The petition was filed on that date and was granted on April 25, 1988. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION, REGULATIONS, AND PROGRAM STATEMENT INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

The pertinent regulations and program statement—28 C.F.R. 540.70 and 540.71 and Bureau of Prisons Program Statement No. 5266.5 (Jan. 2, 1985)—are set forth, in relevant part, as an appendix to this brief (App., *infra*, 1a-4a). They are also reproduced as an appendix to the court of appeals' opinion (Pet. App. 22a-25a).

STATEMENT

This is a nationwide class action brought by federal prisoners in May 1973. The suit challenges the constitutionality of certain regulations and policies of the Federal Bureau of Prisons (BOP) governing the receipt of publications by federal inmates. Numerous federal officials responsible for enforcing those regulations and policies were sued in both their official and individual capacities. In September 1978, the district court ordered the addition, as plaintiffs, of three publishers whose magazines had been rejected at various federal prisons: the Prisoners' Union, Weekly Guardian Associates, and the Revolutionary Socialist League (Pet. App. 2a). On September 13, 1984, following a ten-day bench trial, the district court entered an order upholding the challenged regulations and policies (*id.* at 26a-48a). The court of appeals reversed, holding that the district court had applied an erroneous standard of review. Under a strict scrutiny standard, the

court held, the regulations were unconstitutional on their face (*id.* at 1a-25a).¹

1. a. Under the BOP's regulations, inmates are ordinarily entitled to "subscribe to or to receive publications without prior approval" (28 C.F.R. 540.70(a)).² A publication may be withheld from a prisoner only upon the decision of the warden (28 C.F.R. 540.70(b)), and only if the warden finds that the publication would be "detrimental to the security, good order, or discipline of the institution or [that] it might facilitate criminal activity" (28 C.F.R. 540.71(b)). The warden must review the individual publication before rejecting it; he may not simply establish "an excluded list of publications" (28 C.F.R. 540.71(c)). Moreover, the warden may not reject a publication "solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant" (28 C.F.R. 540.71(b)). Publications that a warden may reject include those that

¹ In addition to resolving respondents' equitable claims involving restrictions on publications, the courts below also adjudicated respondents' challenges to various regulations restricting inmate correspondence. The district court enjoined petitioners from enforcing certain of those regulations, a ruling not appealed by the government, but it upheld the BOP's regulation governing inmate-to-inmate correspondence (Pet. App. 34a-43a, 47a-48a). The court of appeals affirmed the latter ruling (*id.* at 3a-6a), and respondents have not sought review of that aspect of the court of appeals' decision. Accordingly, the validity of the BOP's restrictions on inmate-to-inmate correspondence are not at issue in this Court. Similarly, no issue is raised with respect to individual damage claims brought by 82 named plaintiffs as part of this case. Those claims were severed by the district court in October 1979 (*id.* at 26a n.1) and are still pending.

² The regulations define "publication" as "a book (for example, novel, instructional manual), or a single issue of a magazine or newspaper, plus such other materials addressed to a specific inmate as advertising brochures, flyers, and catalogues" (28 C.F.R. 540.70(a)).

meet one of seven specified criteria.³ The regulations also contain procedures for providing notice and an explanation to the inmate if a publication is rejected and for enabling inmates and publishers to file administrative appeals.⁴ Finally, although it is not set out in the regulations,

³ Those criteria (with brackets reflecting portions that have not been challenged by respondents) are as follows (28 C.F.R. 540.71(b)):

- (1) [It depicts or describes procedures for the construction or use of weapons, ammunition, bombs or incendiary devices;]
- (2) It depicts, encourages, or describes methods of escape from correctional facilities, [or contains blueprints, drawings or similar descriptions of Bureau of Prisons institutions;]
- (3) [It depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs;]
- (4) [It is written in code;]
- (5) It depicts, describes or encourages activities which may lead to the use of physical violence or group disruption;
- (6) It encourages or instructs in the commission of criminal activity;
- (7) It is sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity.

In addition to these criteria, the standards governing sexually explicit publications are contained in BOP Program Statement No. 5266.5 (see App., *infra*, 3a-4a; Pet. App. 24a-25a).

⁴ Under 28 C.F.R. 540.71(d), the warden must "promptly advise the inmate in writing of the decision [rejecting a publication] and the reasons for it." The notice must refer to "the specific article(s) or material(s) considered objectionable" (*ibid.*). The inmate shall be permitted to review the material for purposes of filing an administrative appeal (see 28 C.F.R. 542.15) "unless such review may provide the inmate with information of a nature which is deemed to pose a threat or detriment to the security, good order or discipline of the institution or to encourage or instruct in criminal activity" (28 C.F.R. 540.71(d)). The regulations also provide that the warden shall send a copy of the inmate's notice to the publisher or sender of the publication (28 C.F.R. 540.71(e)). Furthermore, the warden is required to "advise the

the BOP's practice is that when any portion of a publication is deemed excludable, the entire publication is withheld (Pet. App. 34a).

b. At trial, respondents presented the testimony of various present and former state correctional officials, correctional experts, and federal prisoners. Those witnesses offered their opinions concerning the need for the BOP's regulations. In addition, respondents offered into evidence 46 publications that had been rejected at various federal prisons.

Petitioners introduced the testimony of several federal correctional officials, a state correctional official, and a social scientist who headed the BOP's training program. Those witnesses similarly offered their opinions concerning the need for the BOP's regulations.

At the conclusion of the trial, the district court took the case under advisement. On September 13, 1984, the court issued a lengthy opinion setting forth its findings of fact and conclusions of law. Based on the evidence at trial and the governing case law, the court held that the BOP's regulations and policies represented a reasonable response to legitimate penological concerns and were therefore constitutional (Pet. App. 28a-32a, 43a-47a).

In its opinion, the court found that at higher-security federal prisons, "minimizing violence is a primary concern" (Pet. App. 28a). The court noted that the problem has been "aggravated" in recent years by "the growth [in prisons] of ethnic gangs," which "engage in organized crime including extortion, drug activity, and homicide" (*ibid.* (footnote omitted)). In addition, the court indicated that homosexual behavior, while prohibited in federal

publisher or sender that he may obtain an independent review of the rejection by writing to the Regional Director within 15 days of receipt of the rejection letter" (*ibid.*).

prisons, is "widespread in the male prisons," and that "[m]any assaults on fellow inmates are precipitated by or manifested in homosexual activity" (*ibid.*).

Addressing the link between publications and security problems, the court found that "publications can present a security threat" (Pet. App. 31a). After summarizing the types of publications that have been rejected at federal prisons (*id.* at 29a),⁵ the court noted that not only "racial publications but materials concerning prison management and prison life" frequently "speak in strident, inflammatory terms," and that "a warden might well find such publications too provocative for his institution at a given time" (*id.* at 31a). In addition, the court noted, "[o]ther publications too might be dangerous to have on hand in a particular facility" (*ibid.*). For example, "a sexual magazine * * * might be undesirable in an institution that has had a high incidence of sexual assault" (*ibid.*). According to the court, "[t]he possible dangerous situations are as various as publications and circumstances at given institutions" (*ibid.*).

The district court held that the BOP's regulations were reasonable because they were directed at "potentially volatile publications" and because they did not contain a "blanket ban" on publications but provided for a "case-

⁵ According to the court, such publications include "sexually explicit" publications, "non-explicit homosexual publications," publications that "preach ethnic superiority, such as the newsletter of the American Nazi Party," publications that "advocate the unionization of prisoners, highlight instances of alleged abuse by prison officials, or state grievances of prisoners generally," publications that "facilitate gambling by giving odds for the week's sporting events," publications relating to "self-defense," and "instructional materials on electronics and radio" (Pet. App. 29a (footnote omitted)). The court stated that "[m]agazines and journals are not excluded by title but are reviewed on an issue-by-issue basis" (*ibid.*).

by-case determination" of acceptability (Pet. App. 47a). The court further held that in light of the differences in circumstances at different times and among different institutions, the BOP was justified in adopting "a standard that gives the warden wide discretion" (*id.* at 31a).

The court rejected respondents' argument that under *Procunier v. Martinez*, 416 U.S. 396 (1974), the burden was on petitioners to show that the regulations furthered an important government interest and were not unnecessarily broad (Pet. App. 43a-44a). The court pointed out that in several post-*Martinez* cases,⁶ the Supreme Court had applied a more deferential standard—*i.e.*, whether there is a rational relationship between the prison regulations and legitimate penological objectives (*id.* at 44a-47a). The court noted (*id.* at 47a) that heightened scrutiny was not required simply because various publishers had joined in challenging the regulations. It reasoned that *Martinez* did not apply because, unlike in that case, "the rights of [the outsiders] are not 'inextricably meshed' with those of inmates" (*id.* at 46a & n.16 (quoting 416 U.S. at 409)). Moreover, the court found that the standard proposed by respondents, which required a " 'likely,' 'immediate,' or 'substantial' threat," could lead to the "admission of publications which, even if they did not lead directly to violence, would exacerbate tensions and lead indirectly to disorder" (Pet. App. 32a (footnote omitted)).

The court also rejected respondents' contention that the reasons given by prison officials for rejecting the 46 publications introduced at trial were not sufficiently clear or precise (Pet. App. 32a-33a). The court noted that, while the reasons given did not refer to specific prison risks, the

⁶ *Pell v. Procunier*, 417 U.S. 817 (1974); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Bell v. Wolfish*, 441 U.S. 520 (1979).

government's witnesses "testified * * * that it is unwise to inform inmates of conditions that cause security concerns in the warden" (*id.* at 33a). Finally, the court upheld the BOP's policy of rejecting an entire publication if a portion is found to be excludable (*id.* at 34a).

2. The court of appeals reversed the district court and held that the challenged portions of the BOP's publication regulations were unconstitutional on their face (Pet. App. 6a-21a). While the court did not dispute the district court's finding that the regulations passed muster under a reasonableness standard, the court held that, because the case deals "with some aspect of the First Amendment rights of a non-inmate, and * * * with the expression of ideas on paper," the strict scrutiny standard adopted in *Martinez* is the governing standard (*id.* at 7a-8a). The court found that this Court's post-*Martinez* decisions applying a more deferential standard were distinguishable because those cases dealt with "conduct within the prison, rather than the content of expression" (*id.* at 12a).

The court stated that, under *Martinez*, the proper test is whether a publication "encourage[s] conduct which would constitute, or otherwise [is] likely to produce, a breach of security or order or an impairment of rehabilitation" (Pet. App. 20a). The court found that the BOP's regulations were deficient under that test because they permitted "a far looser causal nexus between expression and proscribed conduct" (*id.* at 15a). The court also struck down the BOP's policy of withholding an entire publication if a portion is deemed excludable (*id.* at 16a-17a).

The court remanded the case to the district court to rule, under a strict scrutiny standard, on whether the BOP had acted lawfully in rejecting the 46 publications that respondents had introduced at trial (Pet. App. 21a).⁷

⁷ The court noted that, because some of the rejections occurred in 1977, "the district court should determine whether and to what extent

SUMMARY OF ARGUMENT

The court of appeals held that the constitutionality of the BOP's regulations and policies governing the receipt of publications by federal inmates must be reviewed under the strict scrutiny standard enunciated in *Procunier v. Martinez*, 416 U.S. 396 (1974). In our view, the court's holding is erroneous because it fails to give proper weight to the judgments of prison officials and to the unique characteristics of penal institutions.

A. This Court has stated that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, No. 85-1384 (June 1, 1987), slip op. 9. Applying that test, the Court has upheld a variety of prison regulations and policies. See *O'Lone v. Estate of Shabazz*, No. 85-1722 (June 9, 1987) (work attendance rules that prevented attendance at weekly religious services); *Block v. Rutherford*, 468 U.S. 576 (1984) (ban on contact visits with nonprisoners); *Bell v. Wolfish*, 441 U.S. 520 (1979) (ban on receipt of hardback books from outside sources); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977) (prohibition on prisoners' union meetings, inmate solicitation of other inmates concerning the union, and bulk mailings from outside sources regarding union activities); *Pell v. Procunier*, 417 U.S. 817 (1974) (ban on inmate interviews with members of the press); cf. *Turner v. Safley*, *supra* (apply-

the individual rejections are moot" (Pet. App. 21a). In addition, the court of appeals analyzed, for illustrative purposes, the reasons given by wardens for rejecting five of the publications at issue. The court held that, in each case, the statements could not "be deemed findings of an adequate causal nexus between a rejected publication and a breach of security or order or interference with rehabilitation" (*id.* at 17a-20a).

ing deferential standard to regulations governing inmate-to-inmate correspondence but leaving open question whether strict scrutiny standard should apply to regulations restricting marriages between inmates and outsiders).

B. Notwithstanding this Court's repeated rejection of a heightened scrutiny standard, the court of appeals applied that standard in reviewing the constitutionality of the BOP's regulations and policies governing the receipt of publications by inmates. In doing so, the court relied almost entirely on this Court's decision in *Procunier v. Martinez*, *supra*. In *Martinez*, the Court applied strict scrutiny in striking down prison regulations restricting correspondence between inmates and outsiders.

Martinez was a very narrow decision. The Court emphasized that the class of outsiders involved in that case had a special interest in communicating with specific prisoners (416 U.S. at 408), and it stated that its decision applied only to "direct personal correspondence between inmates and those who have a particularized interest in corresponding with them" (*ibid.* (footnote omitted)). The Court noted (*id.* at 408 n.11) that "[d]ifferent considerations may come into play in the case of mass mailings," and it "intimate[d] no view as to [the] proper resolution" of that issue.

The court of appeals adopted the *Martinez* standard in this case, despite the *Martinez* Court's refusal to extend its analysis to cases such as this one. The court of appeals held the *Martinez* standard applicable because that case, like this one, "deal[t] with some aspect of the First Amendment rights of a non-inmate, and both deal[t] with the expression of ideas on paper and not with conduct qua expression" (Pet. App. 7a-8a).

The court of appeals' distinction between "the expression of ideas on paper" and "conduct qua expression" finds no support in this Court's cases. To the contrary,

several cases in which the Court has applied a reasonableness standard involved restrictions on "the expression of ideas on paper." See *Turner v. Safley*, *supra*; *Jones v. North Carolina Prisoners' Labor Union*, *supra*; *Bell v. Wolfish*, *supra*.

The fact that nonprisoners are affected by a particular regulation is not enough to mandate heightened scrutiny. There is a critical distinction between the interests at stake in *Martinez* and those involved here. *Martinez* involved personalized correspondence from individuals, such as family members and friends. Substantial restrictions on such correspondence would effectively disable the nonprisoners from engaging in the communication that was the reason for their correspondence. In the case of publishers, however, the interests at stake are far less substantial. Unlike correspondents, a publisher and a reader do not engage in personal communication, and the publisher has no particularized interest in communicating with an individual reader. The regulations at issue merely reduce the potential audience for a particular publication by enabling a specific institution to exclude that publication. Because the interests of the publishers are not comparable to the interests of the nonprisoners in *Martinez*, there is no justification for applying the special standard in *Martinez*, rather than the standard generally applicable when prison regulations are subjected to constitutional challenge.

C. In addition to conflicting with the Court's decisions upholding restrictions on inmate conduct, the adoption of the *Martinez* standard in this case would be inconsistent with this Court's cases involving nonpublic forums. Those cases make clear that regulations governing nonpublic forums must be upheld if they are "reasonable in light of the purpose which the forum at issue serves." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S.

37, 49 (1983) (footnote omitted). A reasonableness standard applies in such cases because, in a nonpublic forum, outsiders have no generalized right to distribute materials or engage in other First Amendment activity. The court of appeals, by applying strict scrutiny, erroneously treated prisons as if they were public forums, even though they "most emphatically" are not (*Prisoners' Union*, 433 U.S. at 136).

D. Finally, the standard adopted by the court of appeals is unsound as a matter of policy and would lead to serious practical problems within prisons. As the district court found (Pet. App. 32a), publications may very well threaten prison security even where prison officials cannot sustain their evidentiary burden, under a strict scrutiny standard, of showing that the publications are likely to be directly linked to violence or disruption.

Contrary to the court of appeals' assumption, the reasonableness standard is not without substance; it provides protection to publishers or inmates in cases where the prison's security concerns are irrational or greatly exaggerated. At the same time, however, that standard gives prison administrators the flexibility to enable them to perform the difficult task of maintaining security and good order without having every decision they make subject to exacting scrutiny by a court.

ARGUMENT

THE BUREAU OF PRISONS' REGULATIONS GOVERNING THE RECEIPT OF PUBLICATIONS BY INMATES SHOULD BE JUDGED UNDER A REASONABLENESS STANDARD

The question in this case is whether the court of appeals applied the correct standard of review in evaluating the constitutionality of the BOP's regulations and policies

governing the receipt of publications by federal prisoners. The court held that those regulations and policies must be tested under the heightened scrutiny standard of *Procunier v. Martinez*, 416 U.S. 396, 413 (1974), *i.e.*, whether prison officials demonstrated that the regulations or policies " 'further an important or substantial governmental interest unrelated to the suppression of expression' " and are " 'no greater than is necessary or essential to the protection of the particular governmental interest involved' " (Pet. App. 8a (quoting 416 U.S. at 413)). The court of appeals rejected the government's claim that a more deferential standard was appropriate (Pet. App. 10a).

It is our submission that the court of appeals applied an incorrect standard. This Court, in every prison case decided since *Martinez*, has indicated that a prison regulation or policy must be sustained if it "is reasonably related to legitimate penological interests." *Turner v. Safley*, No. 85-1384 (June 1, 1987); accord *O'Lone v. Estate of Shabazz*, No. 85-1722 (June 9, 1987), slip op. 5-6; *Block v. Rutherford*, 468 U.S. 576, 586, 589 (1984); *Bell v. Wolfish*, 441 U.S. 520, 550-551 (1979); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 125, 128 (1977); *Pell v. Procunier*, 417 U.S. 817, 827 (1974). In rejecting a "reasonableness" standard, the court of appeals viewed *Martinez* as controlling. But *Martinez* was a narrow decision based on the substantial impact of particular regulations on the rights of a unique category of non-prisoners. That decision is not applicable in the present case, which involves, at most, merely an incidental impact on publishers.

Moreover, as we explain below, a heightened scrutiny standard would subject prison administrators to a burden that is generally insurmountable, thereby forcing prisons to admit publications that may lead to serious safety and security problems. We submit that a reasonableness stand-

ard best balances the interests of publishers (and inmates seeking to receive publications) against the need for prison security.

A. As A General Rule, Prison Regulations And Policies Must Be Upheld If They Are Reasonably Related To Legitimate Penological Objectives

This Court has identified two principles that govern the analysis of inmates' constitutional rights. The first principle is that "federal courts must take cognizance of the valid constitutional claims of prison inmates" (*Turner*, slip op. 4). Thus, prisoners retain a variety of constitutional rights notwithstanding the fact of their incarceration. See, e.g., *Bounds v. Smith*, 430 U.S. 817 (1977) (access to courts); *Estelle v. Gamble*, 429 U.S. 97 (1976) (Eighth Amendment); *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (due process); *Johnson v. Avery*, 393 U.S. 483 (1969) (access to courts). Of course, a corollary of that principle is that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285 (1948). See, e.g., *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (noting that "prisoners have no legitimate expectation of privacy and * * * the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells").

The second principle is "the recognition that 'courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform' " (*Turner*, slip op. 5 (quoting *Martinez*, 416 U.S. at 405)). As this Court has explained, "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the Legislative and Executive

Branches of Government" (*Turner*, slip op. 5). An "essential" objective in running a prison is "maintaining institutional security and preserving internal order and discipline" (*Wolfish*, 441 U.S. at 546). To carry out that objective, prison officials must be given "wide-ranging deference" in the way they run their prisons (*Prisoners' Union*, 433 U.S. at 126). Judicial deference is essential "not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge" (*Wolfish*, 441 U.S. at 548), but also because of "separation of powers concerns" (*Turner*, slip op. 5). In addition, deference is appropriate because of the unique characteristics of penal institutions. Prisons are "closed, tightly controlled environment[s] peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." *Wolff v. McDonnell*, 418 U.S. 539, 561 (1974); see also *Prisoners' Union*, 433 U.S. at 137 (Burger, C.J., concurring). For that reason, "rules far different from those imposed on society at large must prevail within prison walls," and judges "are not equipped by experience or otherwise to 'second guess' the decisions" of legislators or administrators "except in the most extraordinary circumstances" (*ibid.*).

In a series of cases involving challenges to prison regulations and policies, the Court has applied these two principles in selecting the standard of review to govern prisoners' constitutional complaints. In each case, the Court has refused to apply a heightened scrutiny standard, but has instead adopted a reasonableness standard. See *Pell v. Procunier*, *supra*; *Jones v. North Carolina Prisoners' Labor Union*, *supra*; *Bell v. Wolfish*, *supra*; *Block v. Rutherford*, *supra*; *Turner v. Safley*, *supra*; *O'Lone v. Estate of Shabazz*, *supra*.

Thus, in *Pell*, the Court rejected a First Amendment challenge by various prisoners and journalists to a California prison regulation that prohibited face-to-face media interviews with individual prisoners. The Court noted that the security concerns upon which the regulation was based were "peculiarly within the province and professional expertise of correction officials" and were therefore entitled to deference (417 U.S. at 827).⁸

In *Prisoners' Union*, the Court upheld a prison's ban on union meetings, union membership solicitation, and bulk mailings of union publications for distribution within the prison. The Court stated that "[t]he necessary and correct result of our deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations in situations such as this" (433 U.S. at 128).

In *Wolfish*, the Court upheld, against a First Amendment challenge, a rule restricting prisoners' receipt of hardback books unless mailed directly from publishers, book clubs, or bookstores. Stressing the need for deference to the "considered judgment" of prison experts, the Court found the rule to be a "rational response" to a bona fide security problem (441 U.S. at 550-551). Similarly, in *Rutherford*, the Court upheld a prison's ban on contact visits with nonprisoners on the ground that such a ban was "reasonably related" to legitimate security concerns, as determined by "responsible, experienced administrators" (468 U.S. at 586, 589).

Finally, in two cases decided last Term, *Turner* and *Shabazz*, the Court made clear that *all* inmate challenges to the constitutionality of prison regulations must be

⁸ Similar policies of the Federal Bureau of Prisons were upheld by the Court in *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), which was decided the same day as *Pell*.

assessed under a reasonableness test. In *Turner*, the Court upheld regulations governing inmate-to-inmate correspondence.⁹ And in *Shabazz*, the Court upheld against a First Amendment challenge a prison's work assignment rules that had the effect of preventing inmates from attending a weekly Muslim congregational service held at the prison. In both *Turner* and *Shabazz*, the Court rejected the lower courts' holdings that a heightened scrutiny standard was the proper one (*Turner*, slip op. 8; *Shabazz*, slip op. 6-7). In so doing, the Court stated in no uncertain terms that "'when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests'" (*Shabazz*, slip op. 5-6 (quoting *Turner*, slip op. 9)).

In both *Turner* and *Shabazz*, the Court rejected prisoners' arguments that the reasonableness standard should govern only in a limited category of cases. Thus, the Court refused to endorse the position that the reasonableness test should apply solely to "'presumptively dangerous' conduct" (*Shabazz*, slip op. 6 note *; *Turner*, slip op. 8). According to the Court, "[t]he determination that an activity is 'presumptively dangerous' appears simply to be a conclusion about the reasonableness of the prison restriction in light of the articulated security concerns" (*Turner*, slip op. 9). Such a determination, the Court noted (*ibid.*), "provides a tenuous basis for creating a hierarchy of standards of review." Similarly, the Court rejected the argument that "heightened scrutiny is appropriate whenever regulations effectively prohibit,

⁹ The Court struck down, under a reasonableness test, regulations prohibiting most inmate marriages (*Turner*, slip op. 17). In addition, the Court noted (*ibid.*), without deciding the issue, that regulations governing marriages between inmates and outsiders might be governed by heightened scrutiny because of the impact on nonprisoners.

rather than simply limit, a particular exercise of constitutional rights" (*Shabazz*, slip op. 6 n.*). According to the Court, "the presence or absence [of] alternative accommodations of prisoners' rights is properly considered a factor in the reasonableness analysis rather than a basis for heightened scrutiny" (*ibid.*).

In light of *Turner* and *Shabazz*, there can no longer be any dispute that *all* inmate challenges to prison regulations or policies must be governed by a "reasonableness" standard. The Court has made clear its unwillingness, even where claims are made under the First Amendment, to " 'substitute [its] judgment on * * * difficult and sensitive matters of institutional administration' for the determinations of those charged with the formidable task of running a prison" (*Shabazz*, slip op. 10 (quoting *Rutherford*, 468 U.S. at 588)).

B. This Court's Decision In *Procunier v. Martinez* Does Not Require Heightened Scrutiny In The Present Case

Notwithstanding this Court's repeated rejection of a heightened scrutiny standard, the court of appeals applied that standard in evaluating the BOP's regulations and policies governing the admission of publications. The court determined (Pet. App. 7a-8a) that a strict scrutiny standard was mandated by this Court's decision in *Procunier v. Martinez*, *supra*. In fact, however, *Martinez* involved a completely different factual setting and is not controlling here.

In *Martinez*, the Court was faced with a constitutional challenge to California prison regulations that prohibited letters between inmates and noninmates that "unduly complain" or "magnify grievances," "express[] inflammatory political, racial, religious, or other views or beliefs," "pertain to criminal activity," are "lewd, obscene, or defamatory; contain foreign matter, or are otherwise

inappropriate" (416 U.S. at 399-400 (citations and footnotes omitted)). Although many of those restrictions arguably would not have survived even under a reasonableness standard, the Court applied strict scrutiny because the regulations imposed a substantial burden on the First Amendment rights of nonprisoners (*id.* at 408).

As the Court's opinion makes clear, *Martinez* was a very narrow decision. The Court emphasized that the outsiders had a special interest in communicating with specific prisoners (416 U.S. at 408). To illustrate the point, the Court noted that "[t]he wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him" (*id.* at 409).

Significantly, the Court in *Martinez* stated that the decision in that case applied only to "direct personal correspondence between inmates and those who have a particularized interest in communicating with them" (416 U.S. at 408). The Court noted that "[d]ifferent considerations may come into play in the case of mass mailings" (*id.* at 408 n.11). With respect to materials of that nature, the Court "intimate[d] no view" as to the proper standard to apply.

The court of appeals concluded that the *Martinez* standard was controlling in this case, despite the *Martinez* Court's express refusal to extend its analysis to cases such as this one. According to the court of appeals (Pet. App. 7a-8a), *Martinez* was dispositive because both that case and this one "deal with some aspect of the First Amendment rights of a noninmate, and both deal with the expression of ideas on paper and not with conduct qua expression." We submit that neither of the two grounds relied upon by the court of appeals for applying *Martinez* can withstand scrutiny.

The court of appeals' distinction between "the expression of ideas on paper" and "conduct qua expression" finds no support in *Martinez* itself and is contrary to all of this Court's post-*Martinez* decisions. If the court of appeals' standard were applied logically, heightened scrutiny would be required whenever the "expression of ideas on paper" is involved, even if only prisoners' claims are at issue. Yet, as we have noted, this Court has made clear that *all* claims that prison regulations violate inmates' constitutional rights must be reviewed under a reasonableness standard. See *Shabazz*, slip op. 5-6; *Turner*, slip op. 9. Indeed, several cases that have applied a reasonableness standard plainly involve restrictions on "the expression of ideas on paper." See *Turner v. Safley*, *supra* (upholding restrictions on inmate-to-inmate correspondence); *Jones v. North Carolina Prisoners' Labor Union*, *supra* (upholding, inter alia, ban on the receipt by prisoners of bulk mailings about unions); *Bell v. Wolfish*, *supra* (upholding rule restricting prisoners' receipt of hardback books, except where such books are mailed directly from publishers, book clubs, or book stores).¹⁰ We know of no decision by this Court that supports the court of appeals' conclusion that heightened scrutiny should apply in reviewing prison regulations simply because ideas expressed on paper are involved.

The court of appeals is equally incorrect in holding that, under *Martinez*, strict scrutiny is required merely because the rights of nonprisoner publishers are involved. To begin with, there is a critical distinction between the rights at stake in *Martinez* and those of the outsiders here. *Martinez*

¹⁰ The court of appeals is simply wrong in distinguishing those cases as dealing with "action and conduct occurring or threatened within the prisons" rather than with the "expression of ideas on paper" (Pet. App. 10a; see Pet. App. 7a).

involved correspondence from individuals, such as family members and friends, who have a direct personal relationship with a particular inmate. Substantial restrictions on personal correspondence with inmates would amount to a prohibition against communication of that kind. In the case of publishers, however, the interests at stake are far less substantial. Unlike correspondents, a publisher and a reader do not engage in "personal" communication (*Martinez*, 416 U.S. at 408), and a publisher has no "particularized interest" (*ibid.*) in distributing its publication to any individual reader. Moreover, the regulations at issue in this case affect publishers in only the most indirect way. They do not prohibit a publisher from printing a particular article or distributing it to the general public. Rather, out of a universe of potential readers, the regulations simply reduce the potential audience for a particular issue of a publication by preventing a specific institution from receiving it at a particular time. Furthermore, with the exception of those specific publications that are determined to pose a danger to a particular institution at a particular time, publishers are free to send their publications to federal inmates. See 28 C.F.R. 540.70(a).

This Court's post-*Martinez* decisions refute the court of appeals' apparent assumption that an impact on outsiders, however indirect, triggers strict scrutiny review. In several cases, the Court has upheld prison restrictions under a deferential standard of review, even though the constitutional rights of outsiders were involved to some extent. For example, in *Block v. Rutherford*, *supra*, the Court upheld, under a reasonableness standard, a blanket prohibition on contact visits with nonprisoners. The respondent in that case, relying on *Martinez*, unsuccessfully argued for heightened scrutiny on the ground that the rights of outsiders—the visitors—were involved (see *Rutherford* Resp. Br. 32). Similarly, in *Pell v. Procunier*,

supra, the Court applied a reasonableness standard and upheld a regulation prohibiting face-to-face media interviews with individual inmates. That regulation, of course, had a direct and immediate impact on members of the press and the public at large. *Pell* and *Rutherford* thus demonstrate that *Martinez* does not stand for the broad proposition that the court of appeals attributed to it: that strict scrutiny must be applied to any prison regulation that somehow affects the rights of nonprisoners.

C. A Heightened Scrutiny Standard Would Undermine This Court's Decisions Involving Nonpublic Forums

By extending *Martinez* to apply to outside publishers, the court of appeals not only disregarded this Court's cases dealing with constitutional claims in the prison context, it also ignored a separate but parallel line of authority: the Court's decisions involving nonpublic forums. The court of appeals erroneously treated prisons as if they were public forums, even though they "most emphatically" are not. *Prisoners' Union*, 433 U.S. at 136; see also *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 & n.9 (1983).

This Court has made clear that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). Thus, while "the most exacting scrutiny" applies in the context of public forums when the government seeks to regulate communication, *e.g.*, *Boos v. Barry*, No. 86-803 (Mar. 22, 1988), slip op. 7, different standards apply in the case of nonpublic forums. *Perry*, 460 U.S. at 46. In a nonpublic forum, outsiders have no generalized right to distribute materials or engage in other First Amendment activity. See, *e.g.*, *Greer v. Spock*, 424

U.S. 828, 838-840 (1976) (upholding regulations prohibiting demonstrations and partisan political speeches on military bases and barring distribution of publications deemed detrimental to the functioning of the base); *Adlerley v. Florida*, 385 U.S. 39, 47-48 (1966) (rejecting argument that demonstrators have a constitutional right to speak and protest within a jail facility). Thus, "[i]n addition to time, place, and manner regulations, the [government] may reserve the [nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46. Furthermore, in a nonpublic forum, distinctions that "may be impermissible in a public forum" are "inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property" (*Perry*, 460 U.S. at 49). See generally *Hazelwood School Dist. v. Kuhlmeier*, No. 86-836 (Jan. 13, 1988), slip op. 9 (holding that the high school newspaper at issue was not a public forum and that "school officials were entitled to regulate the contents of [the newspaper] in any reasonable manner"); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion) (upholding city's ban on political advertisements in rapid transit system because a public forum was not involved and restriction was based on legitimate concerns involving, *inter alia*, claims of favoritism that likely would arise in the allocation of limited space).

These principles involving nonpublic forums are directly applicable here. Since prisons are not public forums, publishers have no generalized right to distribute their publications within prison facilities. Rather, prisons are permitted to impose "reasonable" restrictions (*Perry*, 460 U.S. at 46)—even restrictions that would be unconstitu-

tional if they were applied to public forums. This standard of reasonableness, of course, is the same one that, under *Turner*, *Shabazz*, and several other cases, is applicable to inmates' challenges to prison regulations. By holding the BOP to a strict scrutiny standard, the court of appeals erroneously extended to publishers a broad right to disseminate written materials in prisons, a right that simply does not exist in the case of a nonpublic forum.

To be sure, even in a nonpublic forum, the government may not "suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46. But no such suppression is involved here. The BOP's regulations, as written and as applied, are concerned solely with publications that threaten security, discipline, or good order (see App., *infra*, 1a; Pet. App. 22a). Indeed, the regulations expressly provide that "[t]he Warden may not reject a publication solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant" (*ibid.* (emphasis added)). Since the regulations do not restrict speech merely because of a disagreement over its content, the government is permitted to "make distinctions in access on the basis of subject matter and speaker identity." *Perry*, 460 U.S. at 49. See generally *Prisoners' Union*, 433 U.S. at 133 (upholding prison regulations on bulk mailings from unions even though similar restrictions had not been imposed on bulk mailings from the Jaycees, Alcoholics Anonymous, and the Boy Scouts).

D. A Heightened Scrutiny Standard Would Create Serious Practical Problems For Prison Officials And The Courts

In addition to conflicting with the standard of review applied by this Court in numerous decisions involving prisons and other nonpublic forums, the standard adopted by the court of appeals would lead to serious practical

problems within federal prisons. As this Court recently noted, "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration" (*Turner*, slip op. 9). The result of such a restriction could be extremely serious for inmates and officials alike, since it is well known that "[p]rison life, and relations between the inmates themselves and between the inmates and prison officials or staff, contain the ever-present potential for violent confrontation and conflagration" (*Prisoners' Union*, 433 U.S. at 132). Because prisons "are places of involuntary confinement of persons who have a demonstrated proclivity for anti-social criminal, and often violent, conduct," *Hudson v. Palmer*, 468 U.S. 517, 526 (1984), officials must be allowed "to take reasonable steps to forestall * * * a threat * * * before the time when they can compile a dossier on the eve of a riot" (*Prisoners' Union*, 433 U.S. at 132-133 (footnote omitted)).

These concerns are fully applicable to the present case. As the district court found (Pet. App. 28a), the evidence at trial revealed that prison violence is a serious problem, particularly at higher security facilities. Nonetheless, while a warden may have a legitimate fear that a particular publication will cause problems, he will rarely be able to prove a *likelihood* of violence or disorder as a result of the admission of a particular publication. The inability to prove the existence of a substantial security risk in a particular case does not necessarily mean that the warden's fears are exaggerated. As the district court found (*id.* at 32a), requiring strict scrutiny review "could result in admission of publications which, even if they did not lead directly to violence, would exacerbate tensions and lead indirectly to disorder."

The number of publications actually rejected by the BOP in recent years has been quite small.¹¹ At the same time, the BOP believes that certain publications have a considerable potential for disruptive effect, even though it would be difficult to prove that potential effect in a particular case. We submit that in order to maintain security and minimize the risks of disorder within their institutions, BOP officials must retain the right to reject publications without having to satisfy a strict scrutiny test of the sort imposed by the court of appeals.

Several publications introduced at trial as examples of materials that, in respondents' view, were improperly excluded by federal prisons illustrate the basis of our concern. For example, an issue of *Drummer* magazine (Resp. Exh. 20) contains a series of photographs, drawings, and articles depicting, in explicit detail, a wide range of sadomasochistic homosexual acts. An issue of the *NS Report* (Resp. Exh. 21), a publication of the American Nazi Party, contains various white supremacist articles glorifying violent, physical assaults on blacks. An issue of *Hustler* magazine (Resp. Exh. 19) contains depictions of bestiality as well as several photographs featuring a nude child posing with an adult model. And an issue of *Soldier of Fortune* (Resp. Exh. 124) contains a martial arts article accompanied by photographs that demonstrate how to disarm and disable an armed assailant. Although it would seem obvious that such material has no place in a prison, respondents have maintained throughout this case that, under the *Martinez* standard, these and numerous other publications cannot be excluded from federal prisons. We

¹¹ For example, the BOP advises us that during the one-year period between September 1, 1986, and August 31, 1987, an estimated 1,728 publications were withheld by federal prisons out of approximately 1.8 million publications sent to federal inmates.

submit that a standard that compels the admission of such articles cannot be correct.

Another problem with the heightened scrutiny standard is that it would in effect shift from prison administrators to the courts the decision whether to admit specific publications. In virtually every case in which a publication has been withheld, a prisoner can make a nonfrivolous claim under a strict scrutiny standard that the publication should have been admitted. As this Court recently noted (*Turner*, slip op. 9), a heightened scrutiny analysis would "distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." As a result, "[c]ourts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem" (*ibid.*).

It is important to emphasize that the reasonableness test is not a toothless one; it does not leave inmates and publishers without an effective remedy in cases involving arbitrary or irrational rejections of publications. For instance, in *Turner* the Court struck down, under a reasonableness standard, a prison regulation that prohibited most inmate marriages, reasoning that the regulation constituted an exaggerated response to security and rehabilitation concerns (see slip op. 15-20); see also *Green v. Ferrell*, 801 F.2d 765, 772 (5th Cir. 1986) (citation omitted) (striking down prison ban on newspapers and magazines as an "exaggerated response" to security concerns); *Mann v. Smith*, 796 F.2d 79, 82 (5th Cir. 1986) (prison ban on newspapers struck down under deferential standard).¹² A reasonableness test is thus responsive both

¹² The application of a similar standard (a rational basis test) in the equal protection area confirms that such a standard has substance. See, e.g., *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S.

to the First Amendment concerns at stake and to the needs of prison administrators in their efforts to maintain security and good order.

* * * * *

The district court, applying a reasonableness test, upheld the constitutionality of the BOP's prison regulations (Pet. App. 31a-32a, 46a-47a). It further upheld the BOP's "all or nothing" policy of excluding an entire publication if any portion is deemed objectionable (*id.* at 34a). And that court rejected respondents' contention that the reasons given by prison officials for rejecting the 46 publications introduced at trial were not sufficiently clear or precise (*id.* at 32a-33a). The court of appeals, without deciding whether the regulations and policies were valid under a reasonableness standard, ruled that those regulations and policies could not survive strict scrutiny (*id.* at 15a-17a). The court did not rule on the propriety of the BOP's exclusion of the 46 articles introduced at trial by respondents. Instead, while it noted by way of example that the reasons given by the BOP for the exclusion of five of the articles could not withstand scrutiny (see *id.* at 18a-20a), it remanded the matter to the district court for individualized review of the 46 articles under the *Martinez* standard (*id.* at 20a-21a).¹³

432, 447-450 (1985) (requirement of a special use permit for group home for the mentally retarded did not satisfy deferential standard); *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982) (state program of distributing income derived from natural resources based on length of residence held to be irrational and therefore a violation of equal protection).

¹³ The court of appeals noted that some of the rejections occurred as far back as 1977 and that, as to some publications, there may no longer be a live controversy concerning admissibility (Pet. App. 21a).

We believe that the district court was correct in upholding the BOP's regulations, under a reasonableness standard, against a claim of facial invalidity. The regulations permit the exclusion of particular publications only if they are found to be "detrimental to the security, good order, or discipline of the institution," or if they "might facilitate criminal activity" (28 C.F.R. 540.71(b)). To provide guidance to wardens, the regulations contain a nonexclusive list of criteria that justify rejection (see 28 C.F.R. 540.71(b)(1)-(7)). The regulations also make clear that a warden's discretion has limits; thus, a publication may not be rejected simply because "its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant" (28 C.F.R. 540.71(b)). Moreover, the regulations prohibit a warden from establishing an "excluded list of publications" (28 C.F.R. 540.71(c)); instead, the warden must review the specific publication prior to rejecting that publication (*ibid.*). Finally, an appeals procedure is available to publishers and inmates who are dissatisfied with the warden's decision rejecting a publication (see 28 C.F.R. 540.71(d)).

It is apparent that the regulations are drafted to address legitimate security risks within a prison. Indeed, those same concerns are the very type that this Court has held to be "legitimate penological interests." *Turner v. Safley*, slip op. 9; *Pell v. Procunier*, 417 U.S. at 823; *Procunier v. Martinez*, 416 U.S. at 412. The fact that the regulations do not require the warden to find the risk of disruption in the case of a particular publication to rise to the level of a high probability does not render the regulations facially invalid. As this Court stated in *Prisoners' Union*, 433 U.S. at 132, all that is required under a reasonableness standard to justify the curtailment of otherwise protected activities is that the prison officials, "in the exercise of their informed

discretion, reasonably conclude that [the activities] possess the likelihood of disruption to prison order or stability, or otherwise interfere with the legitimate penological objectives of the prison environment." It is precisely that standard that the BOP regulations embody. Of course, even if the regulations are held facially valid, that does not bar constitutional challenges to particular exclusion decisions. If the regulations are applied in a particular instance in a way that violates the reasonableness standard, by reflecting an exaggerated or irrational response to the perceived danger, the application of the regulations can be challenged in that particular case.

While we believe that the court of appeals erred by holding the BOP's regulations to be invalid on their face, we recognize that this Court may wish to leave that issue to the lower courts for disposition on remand. The resolution of that issue will require analysis of each of the individual sections of the regulations. Even under a reasonableness standard, the regulations need not be declared either constitutional or unconstitutional in their entirety. Cf. *Prisoners' Union*, 433 U.S. at 138-139 (Stevens, J., concurring in part and dissenting in part). Respondents conceded below that portions of the regulations are constitutional even under a strict scrutiny test (Pet. App. 15a), and they apparently contend that other portions of the regulations cannot satisfy even a reasonableness test. The court of appeals has not had occasion to determine whether the regulations would be sustained, in whole or in part, under a reasonableness standard, and the Court may wish to have the benefit of that court's analysis rather than reaching that issue on its own.

In addition, there are several subsidiary factual issues that clearly should be remanded to the court of appeals for consideration under a reasonableness standard. To begin

with, there is an issue concerning the constitutionality of the BOP's "all or nothing" policy—i.e., the policy of rejecting an entire publication if any portion is found to be excludable. That issue can only be determined after a detailed analysis of the evidence in this case. The validity of that policy will depend, among other things, on the security and administrative justifications for that policy, the availability of alternative courses of action, and the costs and risks associated with employing those alternatives. See *Turner v. Safley*, slip op. 10-11. In addition, the question as to whether the 46 publications introduced by respondents at trial were properly rejected is one that should be left to the lower courts on remand. That question involves factual issues as to the nature of each of the publications, the perceived dangers presented by each, and even whether there continues to be a live controversy with respect to particular publications.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further consideration under a reasonableness standard of review.

Respectfully submitted.

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APPENDIX

Pertinent Regulatory Provisions

28 C.F.R. 540.70

(a) The Bureau of Prisons permits an inmate to subscribe to or to receive publications without prior approval and has established procedures to determine if an incoming publication is detrimental to the security, discipline, or good order of the institution or if it might facilitate criminal activity. The term publication, as used in this rule, means a book (for example, novel, instructional manual), or a single issue of a magazine or newspaper, plus such other materials addressed to a specific inmate as advertising brochures, flyers, and catalogues.

(b) The Warden may designate staff to review and where appropriate to approve all incoming publications in accordance with the provisions of this rule. Only the Warden may reject an incoming publication.

28 C.F.R. 540.71

* * * * *

(b) The Warden may reject a publication only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity. The Warden may not reject a publication solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant. Publications which may be rejected by a Warden include but are not limited to publications which meet one of the following criteria:

(1) [It depicts or describes procedures for the construction or use of weapons, ammunition, bombs or incendiary devices;]

(2) It depicts, encourages, or describes methods of escape from correctional facilities, [or contains

blueprints, drawings or similar descriptions of Bureau of Prisons institutions;]

(3) [It depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs;]

(4) [It is written in code;]

(5) It depicts, describes or encourages activities which may lead to the use of physical violence or group disruption;

(6) It encourages or instructs in the commission of criminal activity;

(7) It is sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity.

(c) The Warden may not establish an excluded list of publications. This means the Warden shall review the individual publication prior to the rejection of that publication. Rejection of several issues of a subscription publication is not sufficient reason to reject the subscription publication in its entirety.

(d) Where a publication is found unacceptable, the Warden shall promptly advise the inmate in writing of the decision and the reasons for it. The notice must contain reference to the specific article(s) or material(s) considered objectionable. The Warden shall permit the inmate an opportunity to review this material for purposes of filing an appeal under the Administrative Remedy Procedure unless such review may provide the inmate with information of a nature which is deemed to pose a threat or detriment to the security, good order or discipline of the institution or to encourage or instruct in criminal activity.

(e) The Warden shall provide the publisher or sender of an unacceptable publication a copy of the rejection letter. The Warden shall advise the publisher or sender that he may obtain an independent review of the rejection by writing to the Regional Director within 15 days of receipt of the rejection letter. The Warden shall return the rejected publication to the publisher or sender of the material unless the inmate indicates an intent to file an appeal under the Administrative Remedy Procedure, in which case the Warden shall retain the rejected material at the institution for review. In case of appeal, if the rejection is sustained, the rejected publication shall be returned when appeal or legal use is completed.

The bracketed language in § 540.71(b) is not challenged by the plaintiffs.

Program Statement No. 5266.5 reads, in part, as follows:

(a) A Warden may determine that sexually explicit material of the following types is to be excluded, as potentially detrimental to the security, or good order, or discipline of the institution, or facilitating criminal activity:

(1) Homosexual (of the same sex as the institution population).

(2) Sado-masochistic.

(3) Bestiality.

(4) Involving children.

(b) The following points should be emphasized:

(1) It is the local Warden's decision (except for the child-model materials, which are prohibited by law)—a sexually explicit homosexual publication for example may be admitted if it is determined not to pose a threat at the local institution;

(2) Explicit heterosexual material will ordinarily be admitted;

(3) Sexually explicit material does not include material of a news or information type — publications covering the activities of gay rights organizations or gay religious groups, for example, should be admitted;

(4) Literary publications should not be excluded, solely because of homosexual themes or references, if they are not sexually explicit, and

(5) Sexually explicit material may nonetheless be admitted if it has scholarly value, or general social or literary value.